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No. 93-1688

In The

Supreme Court of the United States

October Term, 1993

CENTRAL DISTRIBUTORS OF BEER, INC.,

Petitioner,

v.

DONALD CONN, GLORIA CONN
JOHN NATE BEVERAGE, INC.,
AND JOHN NATE, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

PETITIONER

Central Distributors of Beer, Inc.

RESPONDENTS

John Nate Beverage, Inc. and John Nate, Jr.

OTHER RESPONDENTS

Donald Conn and Gloria Conn

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BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The statement provided by the Petitioner appears to be correct on invoking the jurisdiction of this Court under 28 USC § 1254(1) in that Petitioner's Petition for Writ of Certiorari was entered within the 90-day time period from Petitioner's Petition for Rehearing and/or Reconsideration which was denied by Order entered by the Court of Appeals for the Sixth Circuit on January 25, 1994.

STATEMENT OF THE CASE

Central Distributors of Beer, Inc. filed this action against Donald Conn, Gloria Conn, John Nate Beverage, Inc. and John Nate, Jr. for violation of Central Distributors' exclusive beer distribution rights with Anheuser Busch, Inc. The Complaint alleged four state law claims and one claim under the Racketeering Influenced and Corrupt Organizations Act, 18 USC § 1961 et seq. The District Court granted summary judgment in favor of the Defendants/Respondents on the RICO claim, finding that Central Distributors had failed to prove that the Defendants had committed any predicate acts to support the RICO claim. The District Court then dismissed Central Distributors' state law claim for lack of subject matter jurisdiction.

On March 19, 1992, Central Distributors filed its Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On September 23, 1993, the Sixth Circuit affirmed the District Court, and Central Distributors subsequently filed a Petition for a Rehearing and/or Reconsideration with the Sixth Circuit. On January 25, 1994, the Sixth Circuit denied Central Distributors' Petition for Rehearing and/or Reconsideration.

REASONS FOR DENYING THE PETITION

The decision of the Sixth Circuit is adequately supported by the record, and rests upon well-developed principals of law within its own Circuit's opinions as well as the opinions of other Circuits that have addressed the issue. The Petitioner has failed to present any special or

important reasons for granting the Petition nor any other basis recognized by this Court, and as a result, the Petition should be denied.

I. FACTUAL SUMMARY

Petitioner, Central Distributors, is a wholesaler of Anheuser Busch brands of beer. Pursuant to the Michigan Liquor Control Act and the Wholesaler Equity Agreement between Central Distributors and Anheuser Busch, Central Distributors has an exclusive territory which includes much of Wayne County, Michigan and part of Oakland County, Michigan. Under the exclusive territory agreement, Central Distributors had the exclusive distribution rights for Anheuser Busch products to retailers in its territory.

John Nate Beverage, Inc., another wholesaler of Anheuser Busch products had an exclusive distribution agreement with Anheuser Busch for a territory on the western side of the state of Michigan. As an indication of size of the two distributors, in 1989 Central Distributors sold 4,843,307 cases of beer. During that same year, Defendant/Respondent Nate Beverage sold 538,518 cases of beer.

According to Central Distributors' Complaint, Donald Conn a retired school teacher and Gloria Conn, a school administrator, purchased quantities of Anheuser Busch products from Nate Beverage between 1983 and 1989. The Conns are not licensed retailers under the Michigan Liquor Control Act. The Conns allegedly transported the beer they purchased from Nate Beverage to

their home, which was located in the Central Distributors' exclusive distribution territory. It was alleged in Central's Complaint that the Conns then sold the beer to retailers and individuals in Central's exclusive territory. According to the Complaint, Nate Beverage sold the beer to the Conns knowing the Conns intended to sell, and did sell the beer, in Central's territory. Central Distributors argues the Defendants engaged in this scheme to defraud Central Distributors by usurping sales that otherwise would have been made by Central Distributors or one of its retailers.

Central Distributors also alleged that Nate Beverage and the Conns engaged in an illegal scheme under the Michigan Bottle Bill to defraud Central Distributors. Under the bottle bill, a distributor must charge a deposit of 10 cents for each bottle or can of beer that it sells to a retailer. The retailer then charges the deposit to the individual purchaser. When the purchaser returns the container, the retailer refunds the deposit and, in turn, seeks a refund from the distributor. According to Central Distributors, Nate Beverage sold empty beverage containers to the Conns for which Nate had already repaid the deposit to the retailer. Central alleges in its Complaint that the Conns then returned the empty containers to retailers within Central Distributors' territory for the 10 cent deposit, and the retailers returned the containers to Central Distributors for a refund of the deposit that the retailer never paid to Central Distributors.

During the years that this alleged racketeering activity took place, Central Distributors was underredeemed on empties. Underremption means that Central Distributors of Beer actually sold more full containers and

received deposits on those full containers than they repaid on the return of empty containers, leaving Central with a windfall. Central Distributors is contending in its Complaint that its windfall would have been greater had the Conns not been engaged in returning the empty containers within its exclusive distribution area.

Central Distributors filed this action against the Conns, Nate Beverage and John Nate, Jr. alleging four state law claims and one claim under the Racketeering Influenced and Corrupt Organizations Act, 18 USC § 1961, et seq. In its RICO claim, Central alleges that the Defendants committed mail and wire fraud by engaging in this scheme to sell beer to retailers within Central Distibutors' exclusive territory and to obtain false refunds for deposits from Central Distributors. The Defendants filed a motion to dismiss the action for failure to state a claim upon which relief could be granted. FR Civ. P. 12(b)(6). The District Court granted this motion and afforded Central Distributors an opportunity to amend its Complaint.

After Central Distributors filed an Amended Complaint, the Defendants again filed a motion to dismiss and motion for summary judgment. The District Court granted summary judgment in favor of the Defendants, finding that Central Distributors had failed to present evidence to support its claim that acts of mail or wire fraud existed to support its RICO claim. Specifically, the Court found that there was:

No evidence that John Nate, Jr. sold beer to the Conns through Nate Beverage with any intent to defraud Central Distributors; and there was nothing on the record

to support Plaintiff's RICO count predicated on wire or mail fraud.

Central Distributors appealed to the Sixth Circuit and after entertaining briefs on the issues and oral arguments, the Sixth Circuit, on September 23, 1993, affirmed the District Court by a vote of two to one, with Senior Circuit Judge Welford dissenting. The Court of Appeals ruled that:

> In our opinion, the fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff. Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim. Central Distributors has not produced a shred of evidence showing that any of the defendants made any false statements or omissions to Central Distributors or that Central Distributors relied on any statement or omission to its detriment. . . . In our mind, Central Distributors has failed to point to any testimony or evidence that John Nate, Jr. sold beer through Nate Beverage to the Conns with any intent to defraud Central Distributors. Although the defendants may have committed other wrongs by this scheme, nothing in the record supports Central Distributors' claim that the defendants violated RICO in any way.

Central Distributors filed a Petition for Rehearing and/or Reconsideration with the Sixth Circuit. On January 25, 1994, the Sixth Circuit denied Central Distributors' Petition for Rehearing and/or Reconsideration.

II. THE SIXTH CIRCUIT RULING THAT FRAUD CONNECTED WITH MAIL OR WIRE FRAUD MUST INVOLVE MISREPRESENTATIONS OR OMISSIONS FLOWING FROM THE DEFENDANT TO THE PLAINTIFF IS CONSISTENT WITH THE LANGUAGE OF THE WIRE FRAUD ACT AND IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

A. Petitioner is in error in stating there is a conflict among the circuits that have decided this issue.

Petitioner contends that interstate telephone calls made by Nate to Anheuser Busch to order Anheuser Busch products in the ordinary course of business constitutes wire fraud within the definition of RICO. To defraud within § 1341 and 1343 means to use "dishonest methods or schemes and usually signifies the deprivation of something of value by trick, deceit, chicane or overreaching". *McNally* v *United States*, 483 US 350, 358 (1987). In *McNally* the Supreme Court held that the mail fraud statute was limited in scope to the protection of property rights, which did not encompass a citizen's right to honest government. In late 1988, 18 USC § 1346 was enacted to reverse that portion of the holding in *McNally*. Under § 1346, a scheme or artifice to deprive another of the intangible right of honest services constitutes a scheme or artifice to defraud.

The scope of the mail and wire fraud statutes is broader than that of common law fraud. Nonetheless, not every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud. The plaintiff must have been deceived. Misconduct not involving deception of the

plaintiff, even it if involves deception of third parties to the plaintiff's detriment is not mail or wire fraud upon which Plaintiff can predicate a RICO claim. *McEvoy Travel Bureau, Inc.* v *Heritage Travel, Inc.*, 904 F2d 786 (1st Cir) cert den, 111 SCt 536 (1990), at 792-794.

In *Walters* v *First National Bank N.A.*, 855 F2d 267 (6th Cir, 1988) cert den 489 US 1067 (1989), the Sixth Circuit held that the scheme to defraud must involve misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. The term "scheme to defraud" connotes some degree of planning by the defendant. It is essential that the evidence show that the defendant entertained an intent to defraud. *Atlas Pile Driving Co.* v *DiCon Fin. Co.*, 886 F2d 986 (8th Cir, 1989). However, acts done inadvertently, mistakenly, or in good faith, without an intent to defraud, do not satisfy the mens rea requirement of the statute. *O'Malley* v *New York City Transit Authority*, 896 F2d 704 (2nd Cir, 1990). At a minimum, the mens rea element of the offense requires that reliance be anticipated by the defendant. *Pelletier* v *Zweifel*, 921 F2d 1465 (11th Cir) cert den 112 SCt 167 (1991).

Petitioner is incorrect in representing that the state of the law on the issue of whether a defendant must make a false statement to the person defrauded is confused among the circuits that have addressed the issue. In fact, the circuit level authority clearly supports the convergence requirement. *See e.g. United States* v *Shelton*, 848 F2d 1485 (10th Cir, 1988); *United States* v *Lew*, 875 F2d 219 (9th Cir, 1989); *United States* v *Evans*, 844 F2d 36 (2nd Cir, 1988); *McEvoy Travel* v *Heritage Travel, Inc.*, 904 F2d 786 (1st Cir, 1990); *Brandenburg* v *Seidel*, 859 F2d 1179 (4th Cir,

1988). Also well-reasoned opinions have issued in the District Court cases within the Fourth Circuit of *Mylan Laboratories, Inc.* v *Akzo, N.Z., et al*, 770 F Supp 1053 (D. MD, 1991), and *Lifschultz Fast Freight* v *Consolidated Freightways*, 805 F Supp 1277 (D.S.C. 1992). The opinion from the Sixth Circuit on the instant case is clearly built upon the foundation laid by the other circuits as well as the other Sixth Circuit opinions in *Blount Financial Services, Inc.* v *Walter E. Heller & Co.*, 819 F2d 151 (6th Cir, 1987) and *Bender* v *Southland Corp.*, 749 F2d 1205 (6th Cir, 1984).

It is true that not all circuits have addressed this issue and that there are district court decisions holding that a plaintiff who is injured as a proximate result of fraud should be able to recover regardless whether the plaintiff or the third party is the one deceived. It is clear, however, that the circuits are favoring a convergence of the injured party with the deceived as necessary to support the predicate elements of allegations of wire and mail fraud.

In support of its split in the circuits argument, Petitioner relies heavily on *Schrieber Distributing Co.* v *Serv-Well Furniture Co., Inc.*, 806 F2d 1393 (9th Cir, 1986) and represents to this Court that as a result of the *Schrieber* opinion, the Ninth Circuit has ruled that no statement to the person defrauded is necessary. However, in light of *United States* v *Lew, supra*, which relied upon other Ninth Circuit opinions issued in *United States* v *Bonallo*, 858 F2d 1427 (9th Cir, 1988), *United States* v *Mitchell*, 867 F2d 1232 (9th Cir, 1989), and *United States* v *Eggan*, 860 F2d 904 (9th Cir, 1988), the Ninth Circuit clearly stands for the proposition that an element crucial to sustaining a mail fraud

conviction is an intent to obtain money or property through deceiving the victim. Clearly, had the *Schrieber* case been argued subsequent to *Lew* and its progeny, it would not have survived in the Ninth Circuit given its subscription to the convergence requirement.

Petitioner further asserts that another reason to grant certiorari in this case is to address the effect of the *McNally* decision and the enactment of 18 USC § 1346 on the convergence theory, Petitioner's understanding and interpretation of the decision in *McNally* and the enactment of 18 USC § 1346 is, at best, misplaced.

The point of the enactment by Congress of 18 USC § 1346 was to clarify the term "scheme or artifice to defraud" to include the scheme or artifice to deprive another of the intangible right of honest services, which the Court in *McNally* abolished. However, outside the issue of tangible versus intangible, *McNally* remains good law. As the Court in *Mylan Labs* stated "there must be a convergence of the deceived and the injured . . . . This convergence of identity seems inherent in the idea of fraud as provided in the fraud statutes and defined by the Supreme Court in *McNally*." Therefore, contrary to Petitioner's assertion, 18 USC § 1346 does nothing to contraindicate the definition of fraud as provided by the Court in *McNally*.

B. Petitioner's reliance on this Court's prior decision in *Pereira* v *United States*, 347 US 1, 74 SCt 358, 98 L Ed 2d 435 (1954) is misplaced.

Petitioner's assertion that this Court's prior decision in *Pereira* suggesting that this Court would hold no direct

communication to the defrauded party is necessary to establish wire fraud or mail fraud is a total misinterpretation of the opinion delivered by the Court. If anything, *Pereira* supports the convergence principle. There is no question that in a review of the factual basis of *Pereira* that the convergence principle is satisfied.

The scheme to defraud in *Pereira* involved a perpetrator (Pereira) a co-conspirator (Brading) and a victim (Mrs. Gertrude Joyce). Pereira and Brading induced Mrs. Joyce to marry Pereira and upon so obtaining the confidence of Mrs. Joyce, and in furtherance of the scheme to defraud, induced Mrs. Joyce to provide Pereira certain amounts of her monies and assets. In so doing, Brading and Pereira used the mails in furtherance of the scheme. Therefore, the scheme to defraud involved the convergence of the deceived and the injured, thereby meeting the convergence requirement as put forth in the opinion of the Sixth Circuit in the instant case.

In the instant case, the Sixth Circuit opined that there was no representation upon which Central Distributors of Beer ever relied as a result of the alleged scheme to defraud. Therefore, Petitioner's reliance on *Pereira* in support of their position that this Court should grant certiorari is without basis in fact or law.

Respondents assert that the Circuits are clearly stating, without conflict, that to have standing as a civil RICO plaintiff, there must be a showing that the plaintiff is the target of the scheme to defraud and not some incidental second tier plaintiff who, as the result of some alleged scheme, may have suffered some indirect injury. The policy underpinning this principle is shown through the logical conclusion of Petitioner's untenable position.

If Petitioner has standing as a RICO plaintiff, then all second tier plaintiffs which would include any and all beer distributors in the state of Michigan who foreseeably could have lost sales through the conduct of Donald Conn's sale of beer to customers who, as Petitioner argues would have bought beer from those various distributors otherwise. If those second tier plaintiffs have standing as a RICO plaintiff, then why not the potential third tier of plaintiffs, those being retailers who foreseeably lost opportunity to sell beer to retail customers to whom Donald Conn allegedly sold beer, and thereby were deprived of those profits. Finally, an argument could be made also for a potential fourth tier of plaintiffs, those being the customers themselves who did not have the opportunity of purchasing beer from Donald Conn and lost savings on the retail price.

If the Sixth Circuit and this Court adopted the Petitioner's concept that a scheme to defraud involved any and all parties who potentially stood to suffer an injury for a loss of opportunity, the logic of that argument would result in an impermissible broadening of civil RICO to the point where the courts would be deluged with civil RICO complaints and the statute would be senseless.

III. PETITIONER ERRONEOUSLY ASSERTS THAT THE SIXTH CIRCUIT'S RULING THAT ELEMENTS OF WIRE FRAUD DIFFER DEPENDING UPON WHETHER THE CASE IS A CRIMINAL PROSECUTION OR A CIVIL CASE UNDER THE RICO ACT IS IN CONFLICT WITH A PRIOR DECISION OF THIS COURT.

In this Court's ruling in *Sedima S.P.R.L.* v *Imrex Company, Inc.*, 473 US 479, 105 SCt 3275, 87 L Ed 2d 346,

(1985), the scheme to defraud involved a Belgium corporation which had entered into a joint business venture with an American corporation. The plaintiff, Sedima, asserted that Imrex concocted a scheme to defraud Sedima through the presenting of inflated billing statements in order to cheat Sedima out of a portion of its proceeds through the collection of non-existent expenses.

In the Sixth Circuit opinion of *United States* v *Ames Sintering Co.*, 927 F2d 232 (6th Cir, 1990), defendant Ames Sintering Co. and two of its employees were indicted on charges of conspiring to defraud General Motors Corporation through rigging bids on parts contracts. In the instant case, the Sixth Circuit distinguished the scheme to defraud and found that Central Distributors did not produce a shred of evidence showing that any of the Defendants made any false statements or omissions to Central Distributors or that Central Distributors relied on any statement or omission to its detriment. In fact, the Sixth Circuit pointed out that the Conns were not even aware of the existence of Central Distributors until after the commencement of this action. The Sixth Circuit came to the conclusion that Central Distributors failed to produce any testimony or evidence that John Nate, Jr. sold beer through Nate Beverage to the Conns with any intent to defraud Central Distributors. If there was an illegal sale from Nate to Conn, Nate's involvement ended at that point. There was no allegation in the Complaint or Amended Complaint, nor any evidence produced that Nate benefitted from the resale of the beer. Nate's involvement, according to Central's pleading and proofs, ended with the illegal sale to Conn. As stated by the Sixth Circuit, this may be a violation of state law, but does not

establish a RICO claim. This conclusion is completely supported by the facts and common sense.

The Sixth Circuit decision in the instant case is consistent with this Court's opinion in *Sedima* and consistent with the Sixth Circuit's previous decisions, not only in *Ames Sintering*, but also in *Bender* v *Southland Corp., supra* and *Blount Financial Services, Inc.* v *Walter E. Heller & Co., supra*. The crucial distinction that Petitioner refuses to acknowledge lies in establishing a scheme to defraud wherein there must be a convergence between the deception and the victim in order to establish a nexus between predicate acts establishing the fraud and the victim so as to constitute a RICO claim. In the instant case, Petitioner's allegations establish, at best, an illegal sale of beer by Nate to Conn, which incidentally, taking the allegations in a light most favorable to Petitioner, leads to an attenuated injury of the Petitioner. There was a total absence of proof of any scheme between Nate and Conn to defraud Central. Whereas in the decisions of the other circuits, as well as this Court's decisions in *Pereira* and *Sedima*, there clearly has been, in the scheme to defraud, a convergence between the deceived and the injured party.

Alleging mail and wire fraud with nothing more, fails to establish a RICO claim. In this case, Petitioner has alleged interstate calls and deception of Anheuser Busch, Nate's wholesaler, but they have failed to show any fraudulent scheme or intent to deceive on behalf of Respondents against Petitioner, Central Distributors of Beer. That is where their RICO claim is deficient, that is where they have misconstrued the opinion of the Sixth Circuit in this case, and have misunderstood the law of the other Circuits requiring that to establish fraud rising

to the level of a RICO offense, allegations must necessarily include a convergence of the deceived and the injured. The law is and should be interpreted that a RICO claim does not exist when there, at best, exists an attenuated incidental injury occurring to a second tier plaintiff absent scienter or the mens rea sufficient to establish a scheme to defraud.

CONCLUSION

It is respectfully submitted that for all of the above reasons, Respondents assert that the opinions in this field of law emanating from the circuits are loud and clear. The issues asserted by Petitioner lack import for this Court's consideration given the Circuits' consistent opinions. Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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